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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM D. MERCHANT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether due process requires personal notice to a defendant, rather than notice to his attorney, of a scheduled court hearing.

2. Whether the Fourth Amendment exclusionary rule requires the suppression of evidence obtained by law enforcement officers acting in reliance on a facially valid judgment of probation, where that judgment is subsequently held invalid on the ground that it was entered at a proceeding that was procedurally defective.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Cleo L. Marohn was named in the indictment, but she was dismissed from the case by the district court and did not appear in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 760 F.2d 963. The opinion of the district court (App., *infra*, 15a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 20a) was entered on May 14, 1985, and a petition for rehearing was denied on January 13, 1986 (App., *infra*, 19a). On March 6, 1986, Justice Rehnquist extended the time within which to file a petition for

a writ of certiorari to and including April 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment provides, in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Northern District of California, respondent was convicted of manufacturing phencyclidine (PCP), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(5).[1] Respondent was sentenced to ten years' imprisonment, was fined $25,000, and was given a special parole term of seven years. App., *infra*, 4a; E.R. 216. The court of appeals reversed (App., *infra*, 1a-14a).

1. a. In 1980, respondent was convicted in California state court on two misdemeanor counts of

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[1] Respondent was named in the indictment as William D. Merchant (Excerpt of Record (E.R.) 1). The court of appeals' caption is in error.

brandishing a firearm.[2] App., *infra*, 2a, 16a. At the time of sentencing, the state court placed respondent on three years' probation. On one count, the state court sentenced respondent to one year's imprisonment, with the entire term suspended in favor of probation; on the other count, the court ordered respondent to serve six months in jail. 11/14/80 Tr. 7-8 (E.R. 54-55); see App., *infra*, 2a, 16a. As additional conditions of probation, the state court forbade respondent from possessing firearms during his probationary period and required him to "submit his person, residence or vehicle to search and seizure at any time of the day or night by a peace officer with or without a warrant" (11/14/80 Tr. 7-8 (E.R. 54-55); App., *infra*, 2a, 16a).[3]

Immediately after the court had pronounced sentence, a colloquy ensued among the court, respondent, and respondent's trial counsel. Respondent protested that the six-month period of incarceration would be financially burdensome because, as he put it, "what this means to me is everything I own. * * * I have $1,500 a month tractor payments which I cannot

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[2] At the time in question, Cal. Penal Code § 417(a) (West Supp. 1986) made it a misdemeanor for any person, inter alia, to draw or exhibit a firearm in the presence of another person except in self-defense. Section 417(b) made it a felony knowingly to commit the same acts in the immediate presence of a peace officer engaged in the performance of his duties. However, violations of Section 417(b) can be, and in this case were, prosecuted in a California Municipal Court as misdemeanors. See Cal. Penal Code § 17(b)(4) (West Supp. 1986) and § 1462 (West 1982). Since then, Section 417(a) and (b) have been amended, but those amendments are not relevant to this case.

[3] The state court's sentencing order is quoted in full in the court of appeals' opinion. App., *infra*, 4a-5a n.3.

make in jail" (11/14/80 Tr. 8 (E.R. 55)). In response to that plea, the state court agreed to "give you a stay of execution to allow you to enter any work furlough program. I don't want anyone to lose their job" (*ibid.*). Respondent's attorney then stated that he would appeal the conviction on the second count, on which respondent had been ordered incarcerated, and he asked if he could file a notice of appeal at that time (*ibid.* (E.R. 55); see also 5/21/81 Tr. 13). The court replied that the sentence would be stayed pending the appeal (11/14/80 Tr. 8-10 (E.R. 55-57)). At the conclusion of the sentencing proceeding, respondent signed a form acknowledging that he understood and consented to the search and firearms conditions of probation that the state court had imposed (E.R. 119; GX G-2-A; see 5/21/81 Tr. 21).[4]

b. Two months later, in January 1981, the local prosecutor received several reports from respondent's neighbors that they had heard the sound of gunfire coming from respondent's property; one neighbor also reported that he had seen respondent with a rifle (5/21/81 Tr. 72-73, 76-77, 89-90, 96-100). Believing that respondent may have violated his probation by possessing a firearm, the prosecutor examined the file on respondent's case and researched the effect of the stay of respondent's sentence on the conditions of his probation (*id.* at 100-101, 108-109). Although she concluded that only the six-month jail term had been stayed, and not the three-year probationary pe-

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[4] The state court judgment, executed by the clerk and filed on November 14, 1980, contains a handwritten notation at the bottom that reads (GX G-2-B): "Confinement date to be cont. pending appeal." The district court in this case took judicial notice of that judgment (5/21/81 Tr. 128, 130-131).

riod or its conditions (*id.* at 100-101, 113), the prosecutor did not immediately order a search of respondent's residence. Rather, on February 11 she filed and served on respondent's counsel a motion seeking clarification of the court's stay order, so as to eliminate any potential confusion concerning whether the conditions of respondent's probation were in effect (App., *infra*, 2a). Following the filing of that motion, respondent's counsel had several telephone conversations with his client, but he did not advise respondent about the hearing (5/21/81 Tr. 5, 15-17, 25-26).[5]

The prosecutor's motion came on for a hearing on February 27 (App., *infra*, 2a). Shortly before the hearing began, the prosecutor told respondent's counsel about the reports of gunfire from respondent's property (5/21/81 Tr. 101). At the outset of the proceeding, the state court noted that respondent's counsel was present, but that respondent was not (App., *infra*, 22a) Respondent's counsel did not object to conducting the proceeding in respondent's absence, and on the merits he consented to the prosecutor's motion (*ibid.*). The court then stated that the "Court will grant the motion for clarification. Defendant will be reinstated on the terms of probation" (*ibid.*). The court made clear that "[t]he entire probation order that he signed," including the provision forbidding respondent from possessing firearms, was in effect, although respondent was not yet required to report for confinement (*ibid.*). Respondent's counsel subsequently wrote respondent a letter to inform

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[5] Respondent's counsel apparently believed that his client's presence was unnecessary because the hearing would not affect his bail status or his appeal on the count as to which he received the jail term (see 5/21/81 Tr. 14; see also *id.* at 12-16).

him about the proceeding and the fact that the conditions of his probation were in effect (5/21/81 Tr. 10, 19-20, 21, 22, 23-24).[6] Respondent, however, never received that letter (*id.* at 6, 7, 8-9).

c. Four days later, on March 3, several police officers, the local prosecutor, and a civil process server went to respondent's house to conduct a search for firearms and to execute a civil judgment against respondent (5/21/81 Tr. 28-29). After the officers stated their purpose, respondent protested that he was not on probation and asked to speak with his lawyer (*id.* at 31). Respondent was allowed to call his attorney, who told the prosecutor that respondent had not been notified of the state court's February 27 order (App., *infra*, 3a; 5/21/81 Tr. 10, 22-23, 121-122; E.R. 149-153). The state prosecutor decided that the search should be conducted nonetheless. During the ensuing search, the officers discovered approximately 80 firearms scattered throughout the house, a suitcase containing approximately three pounds of methaqualone tablets (quaaludes), a large quantity of chemicals and laboratory equipment that could be used to manufacture PCP, and approximately $360,000 in cash (App., *infra*, 3a, 16a-17a; 5/21/81 Tr. 33-38, 49-50). At that point, the officers arrested respondent and halted their search in order to obtain a telephonic search warrant for respondent's residence (App., *infra*, 3a; 5/21/81 Tr. 38-39, 46). After obtaining the warrant, the officers discovered additional narcotics and laboratory equipment (App., *infra*, 3a, 17a).

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[6] The letter stated, in part, that " '[b]asically the district attorney wanted to maintain the probationary order as active on the first count. The court ordered that the probation remain effective pending the appeal' " (5/21/81 Tr. 23-24).

2. Based on the evidence seized during the search of respondent's house, a federal grand jury indicted respondent on three narcotics charges (E.R. 4-5). Before trial, respondent moved to suppress the evidence seized from his residence on the ground, inter alia, that the search could not be justified under the consent-to-search provision of his probation order, since he had not been notified of the state court's February 27 hearing or order.

The district court denied the motion for two independent reasons (App., *infra*, 15a-18a). First, the court held that the search was lawful because respondent was on probation at that time (*id.* at 17a). The court found that the state court had stayed only that portion of respondent's sentence ordering his incarceration and had not stayed the imposition of probation (*ibid.*). Second, the court held that, in any event, the evidence seized during the search of respondent's house should not be suppressed (*id.* at 18a). The court found that "the law enforcement personnel involved and, for that matter, [respondent's] attorney * * * all held a good faith belief that they had the authority to make a warrantless search of [respondent's] residence based on the [state] trial court's ruling on the motion for clarification or modification" (*ibid.*). Concluding that the exclusionary rule should not apply where evidence " 'is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken[,] belief that they are authorized,' " the court denied respondent's suppression motion (*ibid.*, quoting *United States* v. *Williams*, 622 F.2d 830, 840 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981)).[7]

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[7] The municipal court judge who had originally sentenced respondent later revoked his probation because of the dis-

3. a. The court of appeals reversed (App., *infra*, 1a-14a). At the outset, the court held that respondent had not been placed on probation when he was sentenced on November 14, 1980, because the state court had stayed respondent's entire sentence and not merely that portion requiring his incarceration (*id.* at 5a-6a). The court of appeals then ruled that the state court's February 27, 1981, order was invalid because respondent was not given personal notice of the proceeding (*id.* at 6a-10a). Characterizing the February 27 proceeding as "neither a revocation nor an extension of probation, but * * * what amounted to an initial imposition of probation" (*id.* at 8a), the court held that the consent-to-search provision of the probation order constituted a burden on respondent's liberty, requiring that he be given personal notice of the proceeding (*id.* at 8a-9a). Stating that "[t]he right to notice under the fifth and sixth amendments is personal to the defendant" (*id.* at 9a), the court concluded that "[n]otice to and the presence of [respondent's] attorney does not suffice" for due process purposes (*id.* at 10a (footnote omitted)). Because respondent had not been personally notified of the February 27 hearing, the court held that the order the state court entered on that day was "a nullity"

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covery of firearms in his residence. However, the Superior Court Appellate Division reversed that order, on the ground that respondent was unaware that the conditions of his probation were in effect. *People* v. *Merchant*, No. 296 (Cal. Super. Ct. Nov. 17, 1981), slip op. 2 (E.R. 117). In so ruling, however, the court expressly stated that "[w]e do not in any respect disagree with the decision of the * * * District Court * * * [in this case], * * * which held that the trial court intended to impose probation effective November 14, 1980[,] and that, in any event, the probation search was lawful." Slip op. 2-3 (E.R. 117-118).

(ibid.). Accordingly, the court concluded that, because respondent was not actually on probation at the time of the search of his residence, the search could not be upheld on the strength of the consent-to-search clause in the state court's probation order (*ibid.*).

b. The court of appeals then turned to the question whether the evidence seized from respondent's house was nevertheless admissible under *United States* v. *Leon*, No. 82-1771 (July 5, 1984), given the officers' reliance on the consent-to-search clause contained in the original probation order. App., *infra*, 10a-14a. The court held that the evidence was not admissible because, in the court's view, "none of the law enforcement officers reasonably could have believed that the search related to the interests of effective probation supervision" (*id.* at 11a-12a). The court acknowledged that the prosecutor decided to conduct the search because of the reports of gunfire from respondent's property, which indicated that respondent had violated the condition of his probation that he not possess firearms during his probationary period (*id.* at 12a). However, the court found significance in the fact that, at the time of the search, respondent had not yet been assigned a probation officer and had not received any counseling or supervision, that the prosecutor did not inform either the probation department or the state court of the reports of gunfire, and that she also did not tell the state court at the February 27 hearing about her earlier conversations with local law enforcement officers regarding her desire to search respondent's residence (*ibid.*). Relying on these facts, the court of appeals concluded that "the search was a subterfuge for conducting a criminal investigation" (*ibid.*) and was not "a genuine attempt to enforce probation" (*id.* at 13a). Concluding that the officers' be-

havior "is the type of law enforcement conduct that ought to be deterred" (*ibid.*), the court held that *Leon* was inapplicable and that the evidence seized from respondent's house should be suppressed (*ibid.*).

REASONS FOR GRANTING THE PETITION

1. A longstanding and previously unquestioned feature of both criminal and civil litigation in our legal system is the practice of providing notice of scheduled judicial proceedings to the affected parties through their attorneys. This practice, which is codified in the Federal Rules of Criminal and Civil Procedure, is bottomed upon concerns of practicality and efficiency, as well as the determination that in an adversary system an attorney can and should be trusted with the responsibility of providing his client with the information necessary to a just defense or the prosecution of his cause.

In this case, the court of appeals held that the Due Process Clause requires personal notice to a defendant of a scheduled judicial proceeding, even though the defendant's attorney has been notified of the time and nature of the proceeding. This ruling constitutes a departure from the principles of representative litigation and is inconsistent with provisions of the Federal Rules of Criminal and Civil Procedure. Beyond that, the court of appeals' ruling has the potential for considerable mischief. It creates needless uncertainty as to whether a defendant has been afforded actual notice of scheduled proceedings. It imposes on the prosecutor or the court the burden of duplicating steps that should properly be left to defense counsel. And it invites claims that the defendant was not personally notified and that any ensuing proceeding, as the court of appeals put it, is a "nullity," even though, as here, defense counsel has had

an ample opportunity to inform his client of the proceeding. Given the substantial burdens that may result from the court of appeals' ruling on the notice issue, review by this Court is warranted.

a. The Due Process Clause generally requires personal service of the pleading that commences a civil action because that manner of service ensures that a person will be notified of the pendency of the suit and will have the opportunity to "choose for himself whether to appear or default, acquiesce or contest" a claim against him (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). See, *e.g.*, *Greene* v. *Lindsey*, 456 U.S. 444, 449 (1982). For much the same reason, the Sixth Amendment requires that a defendant in a criminal case "be informed of the nature and cause of the accusation" (U.S. Const. Amend. VI). See, *e.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948). The Federal Rules of Civil and Criminal Procedure implement these principles by requiring that the defendant be served with the pleading, such as the complaint, summons, or indictment, that commences a civil suit or a criminal prosecution. See Fed. R. Civ. P. 4(d); Fed. R. Crim. P. 4(d)(3), 9(c), 10; 18 U.S.C. 3432.[8]

Once a party has retained counsel, due process does not require that the party be personally served with subsequent pleadings or be given personal notice of subsequent proceedings. On the contrary, it is well settled that in our system of representative litigation pleadings may be served on counsel rather than on a

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[8] Even with respect to the original charging document in a criminal case, the courts have not insisted on personal service on the defendant, as long as the defendant receives notice of the charges. See *United States* v. *Clark*, 407 F.2d 1336, 1337 (4th Cir. 1969).

party, even when a motion contemplates or calls for a hearing. In fact, the Federal Rules of Criminal and Civil Procedure expressly *require* that all subsequent motions be served on counsel rather than on a party. See Fed. R. Crim. P. 49(b); Fed. R. Civ. P. 5(b).[9] It is likewise clear that notice to a party's counsel of the pendency of a proceeding is equivalent to notice to the party himself. As this Court has explained, once a party voluntarily chooses an attorney as his representative in the action, he "is considered to have 'notice of all facts, notice of which can be charged upon [his] attorney.'" *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1879)). And as *Link* itself held, the "facts" that may properly be charged to a party include the dates and nature of scheduled hearings. See 370 U.S. at 633-635 (counsel's failure to attend a scheduled pretrial conference, coupled with other

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[9] See 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1145, at 583 (1969) (footnote omitted) ("[t]he requirement of service on the attorney [in Fed. R. Civ. P. 5(b)] is to be followed literally; service upon a party represented by an attorney does not comply with the rule"); 3A C. Wright, *Federal Practice and Procedure: Criminal* § 822, at 234-235 (1982) (stating that Fed. R. Crim. P. 49(b) should be construed in the same manner as Fed. R. Civ. P. 5(b)).

Indeed, the legal profession frowns on direct communications between an attorney and an opposing party. See *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 31 n.52 (Stevens, J., dissenting); ABA *Model Rules of Professional Conduct* 4.2 (1983) ("[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so"); ABA *Model Code of Professional Responsibiilty* DR 7-104(A)(1) (1980).

proof of dilatoriness, may justify dismissal of a suit with prejudice).[10]

It is immaterial that the February 27 hearing took place during a criminal prosecution, rather than a civil suit. The role of defense counsel as the representative designated to receive notice does not differ in the two types of proceedings. See *Jones* v. *Barnes*, 463 U.S. 745, 751-754 & n.6 (1983).[11] Nor does it

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[10] The courts of appeals have reiterated and applied this principle in a wide variety of circumstances. See, *e.g.*, *Salahuddin* v. *Coughlin*, 781 F.2d 24, 27 (2d Cir. 1986) (prison officials are charged with knowledge of court orders entered in a case); *Townsend* v. *Gray Line Bus Co.*, 767 F.2d 11, 19 (1st Cir. 1985) (counsel's failure to appear at a status conference and to object to the substitution of a new judge is charged to his client); *Loyd* v. *Loyd*, 731 F.2d 393, 400 (7th Cir. 1984) (notice to counsel of scheduled probate hearing is deemed to be notice to his client); *United States* v. *Everett*, 700 F.2d 900, 902 n.5 (3d Cir. 1983) (notice to defense counsel that the government has taken an appeal and has filed its brief is deemed to be notice to the defendant). Prior to this case, the Ninth Circuit had also applied this principle. See *NLRB* v. *Sequoia District Council of Carpenters*, 568 F.2d 628, 633 (1977) (notice to counsel of entry of an order binds his client).

[11] For example, the decision how to respond to legal motions is a judgment for defense counsel, not the defendant, to make. See, *e.g.*, *Jones* v. *Barnes*, 463 U.S. at 751-754; see also *Wainwright* v. *Sykes*, 433 U.S. 72, 91 n.14 (1977); *id.* at 93 (Burger, C.J., concurring); *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); *id.* at 515 n.4 (Powell, J., concurring); *Brookhart* v. *Janis*, 384 U.S. 1, 8 (1966) (Harlan, J., concurring); *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). Moreover, a lawyer's ethical obligation to consult with his client regarding the conduct of the defense has no less force in criminal than in civil cases. See *Jones*, 463 U.S. at 753 n.6 ("an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client").

matter for the purpose of notice whether the February 27 hearing is characterized as a sentencing hearing, as the court of appeals described it (App., *infra*, 8a), or merely as a proceeding to clarify the court's previous order. The Constitution imposes no special requirement of notice with respect to sentencing, beyond what is required for other proceedings. And a defendant has the same right to the assistance of counsel at sentencing that he has at other stages of the criminal process. See *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Accordingly, notice to counsel is considered to be notice to the client with regard to a sentencing proceeding, just as in the case of any other type of hearing. Because respondent's counsel had notice of the February 27 hearing, neither the prosecutor nor the court was constitutionally required to notify respondent personally.[12]

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[12] The court of appeals left open the question whether respondent had a constitutional right to be present at the February 27 proceeding. App., *infra*, 10a n.5. Therefore, there is no need for the Court to decide that issue in the first instance. However, there are substantial reasons to doubt that respondent had a constitutional right to be present at the hearing and that his absence rendered the hearing invalid.

A defendant's right to be present at trial is rooted in part in the Confrontation Clause of the Sixth Amendment. See *United States* v. *Gagnon*, No. 84-690 (Mar. 18, 1985), slip op. 4; *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). That right has no application here, since no witness testified at the hearing. *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934); see *Gagnon*, slip op. 4; see also *Rushen* v. *Spain*, 464 U.S. 114, 129-130 n.8 (1983) (Stevens, J., concurring).

To the extent that the right to be present stems from the Due Process Clause (see *Gagnon*, slip op. 4), that provision is likewise inapplicable in this case. As the Court recently noted, "a defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably

b. The court of appeals' decision is not supported by either of the cases it cited (App., *infra*, 9a).

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substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " *Gagnon*, slip op. 4 (quoting *Snyder*, 291 U.S. at 105-106, 107-108); see *Spain*, 464 U.S. at 129-130 n.8 (Stevens, J., concurring) ("we have viewed a potential for prejudice as a necessary element of a violation of the right to be present"); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (the defendant "has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); see also *Snyder*, 291 U.S. at 106-107 (due process does not "assure[] the privilege of presence when presence would be useless, or the benefit but a shadow"). There is no reason to suppose that respondent's presence at the ministerial and perfunctory proceeding on February 27 could have contributed to his defense, particularly in light of the concession by respondent's counsel that the prosecutor's motion was well taken. Cf. *Snyder*, 291 U.S. at 109. Nor does it matter if the effect of the state court's order was to advance the date on which the conditions of respondent's probation, which had already been imposed at sentencing, would go into effect. See *Schwab* v. *Berggren*, 143 U.S. 442, 451 (1892) (defendant has no right to be present when an appellate court fixes the date of execution on a sentence imposed by the trial court). And even if the absence of an objection at the hearing by respondent's counsel does not constitute a waiver of respondent's claim (but cf., *e.g.*, *Howard* v. *Kentucky*, 200 U.S. 164, 173 (1906) (due process not violated by trial court's in camera questioning of juror in absence of defendant and defense counsel where defense counsel had agreed to that procedure)), the absence of an objection by respondent's counsel adds support to the conclusion that respondent was not prejudiced (see *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 18 & n.11).

Finally, it is well settled that a defendant has no right to attend a proceeding that is devoted to purely legal questions. See, *e.g.*, Fed. R. Crim. P. 43(c)(3) (defendant need not be

Faretta v. *California*, 422 U.S. 806 (1975), stated that, under the Sixth Amendment, "[i]t is the accused, not counsel, who must be 'informed of the nature and cause of the accusation'" (*id.* at 819). That principle, however, has no bearing on the question whether the accused has the right to personal service of all pleadings filed during the course of a criminal case or to personal notice of all subsequent hearings on such motions. *Wheeler* v. *United States*, 640 F.2d 1116 (9th Cir. 1981), is also beside the point. There, the district court, acting ex parte, entered an order directing a warden to prevent a prisoner from communicating with the witnesses at his trial. The prisoner, who was not represented by counsel, did not become aware of the order until four years after its entry. Relying on its supervisory powers (*id.* at 1122 n.14), the court of appeals ruled that the district court, absent compelling circumstances, should have held a hearing before entering the order, since the order restricted the prisoner's First Amendment rights (*id.* at 1122). Because *Wheeler* involved an ex parte proceeding—not one in which defense counsel was notified and appeared at the proceeding—that case is not even remotely relevant here.

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present "[a]t a conference or argument upon a question of law"); *Price* v. *Johnston*, 334 U.S. 266, 285 (1948) (defendant has no right to attend appellate proceedings); *Schwab* v. *Berggren*, *supra* (same); *United States* v. *Graves*, 669 F.2d 964, 972-973 (5th Cir. 1982) (defendant has no right to attend a bench conference on jury instructions) (collecting cases). The February 27 hearing involved a purely legal matter—the effect of the state court's stay order—of the sort that would not give rise to a constitutional right to be present.

c. Although we do not mean to overstate the practical effect of the court of appeals' decision, that ruling, if applied broadly, would impose a needless burden on the criminal trial process. The court's decision would require the prosecutor to advise the accused of the developments in the litigation, at the risk that the defense will claim that the prosecutor has interfered with the attorney-client relationship. Alternatively, the court of appeals' ruling would require the district courts to engage in the formality of sending a defendant personal notice of every upcoming proceeding. In either case, unless personal service rather than the mail is used to provide notice, the court of appeals' ruling invites litigation over the questions of whether and when a defendant in fact received notice of a proceeding.

At the same time, requiring the accused to be personally notified of every hearing will not appreciably increase the likelihood that he will be present at proceedings at which his presence is essential but which he would otherwise not attend. It is most unlikely that defense counsel will fail to inform the defendant of such proceedings and that both the court and the prosecutor will also overlook his absence. However, it is only that narrow category of cases in which the court of appeals' ruling will have any appreciable benefit. The court of appeals' ruling thus will lead to needless makework in the vast majority of cases, without substantially contributing to the purposes for which the Due Process Clause ordinarily requires notice.

2. The court of appeals' ruling is also inconsistent with this Court's decisions in *United States* v. *Leon*, No. 82-1771 (July 5, 1984), and *Massachusetts* v. *Sheppard*, No. 82-963 (July 5, 1984). In those cases,

the Court held that evidence obtained by law enforcement officers who reasonably relied on a facially valid search warrant should not be suppressed at trial, even if the warrant is subsequently found to be defective. The Court noted that evidence so acquired should not be suppressed as long as the officers' reliance on the warrant was "objectively reasonable." *Leon*, slip op. 23; accord *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5, 8-9. Here, the court of appeals disregarded this principle. The court ruled that evidence obtained by police officers in reliance on a facially valid probation order must be suppressed because of a procedural defect in the proceeding at which that order was issued. Moreover, in ruling that suppression was required because the search was a subterfuge for a criminal investigation, the court of appeals ignored the prosecutor's reasonable course of conduct in obtaining clarification of the state court's order. The court also ignored the officers' adherence to well-settled principles of state law and the goals of the California probation system in executing the search. Because the court of appeals' decision disregards the principles underlying this Court's ruling in *Leon*, the Court should also review this question as well.

a. In *Leon*, the Court explained that the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates" (slip op. 16) and that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations" (*id.* at 22 (footnote omitted)). Accordingly, the Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion" (*id.*

at 22-23). See *Sheppard*, slip op. 5-8; see also *Michigan* v. *DeFillippo*, 443 U.S. 31, 37-38 (1979).

The principles set forth in *Leon* and *Sheppard* are fully applicable to this case. Just as a search or an arrest warrant can authorize a police officer to enter and search the residence of a probationer (see, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980)), the California courts have long held that the "consent-to-search" clause involved here, which authorized any peace officer to enter and search respondent's residence, may be imposed by the courts as a condition of probation and is valid under the Fourth Amendment. See, *e.g.*, *People* v. *Mason*, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972).[13] In both cases, it is the re-

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[13] Under California law, probation orders commonly contain a provision, such as the one here, requiring probationers to submit to warrantless searches " 'whenever requested to do so' " by a probation officer " 'or any law enforcement officer.' " See, *e.g.*, *People* v. *Mason*, 5 Cal. 3d at 762, 488 P.2d at 631, 97 Cal. Rptr. at 303. The constitutionality of such a condition in California is "beyond dispute" (5 Cal. 3d at 764, 488 P.2d at 632, 97 Cal. Rptr. at 304). See also 3 W. LaFave, *Search and Seizure* § 10.10, at 422-423 (1978) (noting that "there is considerable authority" that courts may validly impose warrantless search provisions in probation orders). However, there must be reasonable grounds to "trigger" a search, and any resulting search must be conducted in a reasonable manner. See *United States* v. *Johnson*, 722 F.2d 525, 527-528 (9th Cir. 1983); *People* v. *Guerrero*, 85 Cal. App. 3d 572, 581-582, 149 Cal. Rptr. 555, 560 (1978); *People* v. *Kasinger*, 57 Cal. App. 3d 975, 978, 129 Cal. Rptr. 483, 485 (1976). The reports of gunfire coming from respondent's property provided reasonable grounds here. See *People* v. *Britton*, 156 Cal. App. 3d 689, 696, 202 Cal. Rptr. 882, 887 (1984).

Moreover, California law does not require that it be a probation officer who conducts the search of a probationer. See, *e.g.*, *People* v. *Mason*, *supra*; *People* v. *Palmquist*, 123

sponsibility of a judicial officer to determine whether an intrusion on a person's privacy is justified and, if so, to issue an order, whether in the form of a warrant or a judgment of probation, comporting with Fourth Amendment requirements. In both cases, a police officer cannot reasonably be expected to question the judicial officer's judgment that the order is legally sound. See *Leon*, slip op. 21-22. And in both cases, once the order is entered, " 'there is literally nothing more the policeman can do in seeking to comply with the law.' " *Id.* at 22 (citation omitted). Accordingly, there is no material difference for present purposes between a search warrant issued by a magistrate and a consent-to-search clause imposed as a condition of probation in the sentence handed down by a trial court. Cf. *Gluck* v. *United States*,

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Cal. App. 3d 1, 7-8 & n.3, 176 Cal. Rptr. 173, 177 & n.3 (1981). Compare *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 262-266 (9th Cir. 1975) (en banc) (construing Federal Probation Act, 18 U.S.C. 3651, as imposing on probation officers the primary responsibility for conducting searches of probationers). Nor, under California law, is the "legality of a probation search * * * determined by the relationship, or lack thereof, of the probation offense to the conduct relied upon to justify the search." *People* v. *Constancio*, 42 Cal. App. 3d 533, 539, 116 Cal. Rptr. 910, 913 (1974). At most, it is sufficient that officers perceive the existence of "circumstances indicating that in connection with effective probation supervision a search is advisable" (*People* v. *Guerrero*, 85 Cal. App. 3d at 582, 149 Cal. Rptr. at 560; *People* v. *Kasinger*, 57 Cal. App. 3d at 978, 129 Cal. Rptr. at 484-485; *People* v. *Bremmer*, 30 Cal. App. 3d 1058 1065-1066, 106 Cal. Rptr. 797, 802 (1973)) and that they announce their authority and purpose prior to entering a residence to conduct a search pursuant to a probation order (see *People* v. *Freund*, 48 Cal. App. 3d 49, 57-58, 119 Cal. Rptr. 762, 767-768 (1975)).

771 F.2d 750, 757-758 (3d Cir. 1985) (summons issued in good faith reliance on a Fed. R. Crim. P. 6(e) disclosure order later held to be defective); *People* v. *Barbarick*, 168 Cal. App. 3d 731, 214 Cal. Rptr. 322, 328 (1985) (good faith reliance on a consent-to-search clause in a release-on-recognizance order; "[h]ere a detached and neutral magistrate issued a facially valid search condition").[14]

The officers' reliance on the consent-to-search clause contained in the probation order was also objectively reasonable. Here, as in *Sheppard*, the prosecutor and the police officers "took every step that could reasonably be expected of them" (*Sheppard*, slip op. 6). The prosecutor sought to clarify respondent's status by filing a motion with the judge who had imposed his sentence. She served the motion on respondent's attorney, who appeared at the hearing and who did not object to going forward in respondent's absence. The officers were advised that the state court had ruled that respondent was on probation and that he was forbidden from possessing firearms during his probationary period. Even if the hearing was invalid because respondent had not been personally notified of its occurrence, the officers were not responsible for respondent's absence from the proceeding or for his failure to receive notice, and neither the officers nor the prosecutor could reasonably be charged with

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[14] As the California Court of Appeals explained in *People* v. *Bremmer*, *supra*, a challenge to the reasonableness of a search conducted pursuant to the terms of a probation order "is analogous to that arising from a claim that a search warrant has been issued by a magistrate on less than probable cause or an arrest warrant on less than reasonable cause. Our present concern is with judicial power rather than police power." 30 Cal. App. 3d at 1062-1063, 106 Cal. Rptr. at 800.

knowledge that the hearing was invalid for the reason given by the court of appeals. In that respect, this case is not materially different from *Sheppard*, in which the Court refused to apply the exclusionary rule because of the magistrate's technical mistake in preparing a search warrant. Finally, both the state municipal court and the district court in this case (App., *infra*, 17a) ruled that respondent was in fact on probation, which is powerful evidence that the officers' actions were objectively reasonable. See *Leon*, slip op. 27.

b. The court of appeals held that *Leon* was inapplicable because "the search was a subterfuge for conducting a criminal investigation" (App., *infra*, 12a) and the participants "apparently had a motive of avoidance of Fourth Amendment requirements" (*id.* at 13a). That conclusion is both legally and factually erroneous.

As a legal matter, the court of appeals ignored the fact that the California law enforcement officers were acting not only in accordance with the terms of a facially valid probation order, but also consistently with well-settled California law regarding the execution of probation searches under consent-to-search clauses. Although the court of appeals charged the officers with conducting a bad faith, pretextual search, the California courts have long held that consent-to-search clauses can validly serve as the basis for probation searches, and that a probation officer need not be a party to the search. See, *e.g.*, *People* v. *Mason*, *supra*; *People* v. *Palmquist*, 123 Cal. App. 3d 1, 7-8, 176 Cal. Rptr. 173, 177 (1981).[15] Because the officers

[15] The cases on which the court of appeals relied in criticizing the state authorities (App., *infra*, 12a) stated that there must be a reasonable factual predicate for conducting a pro-

were acting consistently with the terms of the probation order and settled state law construing such orders, the search cannot fairly be considered a "subterfuge" conducted in bad faith.

There is also no factual basis for the court's conclusion that the officers used the search as a subterfuge for a criminal investigation. Indeed, based on the same record the district court found that the officers acted in good faith (App., *infra*, 18a). The undisputed evidence showed that the sole purpose for the search was to determine whether respondent possessed a firearm in violation of the condition of his probation (5/21/81 Tr. 49, 72, 73, 77, 82, 96-100). The court of appeals also failed to identify the crime that was the supposedly true purpose for the search, and the record does not suggest what that offense was. It was not a crime for respondent to own a firearm, since he had not been convicted of a felony. Pages 2-3, *supra;* see 18 U.S.C. 922(h)(1); 18 U.S.C. App. 1202(a)(1). It was also not a crime for a person to discharge a weapon in the rural area where respondent lived (5/21/81 Tr. 46). Only the conditions of respondent's probation condition made his possession of a firearm relevant. And the officers had no reason to suspect that respondent had a narcotics laboratory in his basement; the officers inadvertently discovered the equipment in plain view while searching for weapons (*id.* at 33-39).

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bation search. See *United States* v. *Johnson*, 722 F.2d at 527-528. Cf. *United States* v. *Jarrad*, 754 F.2d 1451, 1454 (9th Cir. 1985), cert. denied, No. 84-6659 (Oct. 7, 1985) (parole search); *Latta* v. *Fitzharris*, 521 F.2d 246, 251-252 (9th Cir.) (en banc), cert. denied, 423 U.S. 897 (1975) (same). In light of the information possessed by the law enforcement officers about the gunfire coming from respondent's property, the probation search in this case would not run afoul of any of those cases.

Finally, the facts on which the court of appeals relied in concluding that the search was a subterfuge (App., *infra*, 12a), are entirely inconsequential. That respondent had not been assigned a probation officer and had not received any counseling or supervision at most may suggest that the state had not yet made any active effort towards rehabilitating respondent, but it does not mean that the search was unrelated to the purposes of probation. The protection of the public is an important goal of the California probation process. See, *e.g.*, *People* v. *Mason*, 5 Cal. 3d at 764, 488 P.2d at 632, 97 Cal. Rptr. at 304; *People* v. *Britton*, 156 Cal. App. 3d 689, 697, 202 Cal. Rptr. 882, 887 (1984). Determining whether respondent had firearms was directly related to this aspect of probation. After all, he had recently been convicted of brandishing firearms, and the judge who had imposed his probation had made clear at the time of sentencing his concern that respondent not possess firearms.[16]

For much the same reason, it is immaterial that the prosecutor did not inform the sentencing judge at the February 27 hearing of the reports of gunfire on respondent's property or her intent to search his residence for weapons. Given the judge's stated concern that respondent not possess weapons, this information surely would not have dissuaded the judge from granting the prosecutor's motion for clarification. And the prosecutor informed respondent's coun-

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[16] Before imposing sentence, the state trial court commented that "[w]hat really scares me, Mr. Merchant, in my role in protecting the community[,] is that you are just that close in certain instances to violence being committed, and you are just not a man that should have or be near any guns at all" (11/14/80 Tr. 6-7 (E.R. 53-54)).

sel before that hearing began of those reports (page 5, *supra*), so it is clear that she was not attempting to keep any information from respondent. Accordingly, even if the search could not be justified on the basis of the consent-to-search clause in respondent's sentence, the evidence seized from his residence by the officers during a search undertaken in reasonable reliance on the state court's February 27 order and the governing principles of state law should not be subject to suppression.[17]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1986

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[17] In *Illinois* v. *Krull*, cert. granted, No. 85-608 (Mar. 24, 1986), this Court has before it the related question whether the exclusionary rule requires the suppression of evidence seized in reasonable reliance on a statute authorizing warrantless administrative searches that is later held unconstitutional. However, we do not suggest that the Court should hold this petition pending the disposition of *Krull*. The circumstances there make it unlikely that the Court's decision will directly control the disposition of this case, which more closely resembles the situation in *Leon* and *Sheppard*.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1135

D.C. No. 81-109-SW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DAVID WILLIAM MERCHANT, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California
Hon. Spencer M. Williams, Presiding

[Filed May 14, 1985]

OPINION

BEFORE: MERRILL, FLETCHER, and CANBY, Circuit Judges.

FLETCHER, Circuit Judge:

David Merchant appeals his conviction for manufacturing PCP. He challenges the district court's denial of his motion to suppress laboratory equipment and chemical supplies seized by law enforce-

ment officers during a warrantless search ostensibly conducted pursuant to a condition of his state probation. Merchant contends the district court erred in finding that he was on probation at the time of the search. We reverse.

I. BACKGROUND

On November 14, 1980, Merchant was convicted in state court on two counts of brandishing firearms in violation of Cal. Penal Code §§ 417, 417B (West 1982). The state court suspended imposition of sentence and placed Merchant on three years probation. As a condition of probation, Merchant was required to serve eighteen months in jail, twelve months suspended. The court also conditioned Merchant's probation on his consent to searches by probation or law enforcement officers and on the requirement that he not possess any weapons.

Merchant protested the jail detention as unduly harsh, and after some discussion, Merchant's counsel stated his intention to appeal. The court granted a stay of the sentence pending the outcome of Merchant's appeal. No probation officer was ever assigned to Merchant's case.

On February 11, 1981, the assistant district attorney who prosecuted the state action moved for a clarification or modification of the stay. On February 27, the sentencing judge granted the prosecution's motion, stating, "[D]efendant will be reinstated on the terms of probation." Merchant was not present at the hearing. His counsel was present but did not object to the motion.

Four days later, the assistant district attorney and nine state law enforcement officers went to Merchant's

home to execute a civil judgment and conduct a probation search. When the officers arrived, Merchant protested that he was not on probation and would not give permission to search. The officers permitted Merchant to phone his attorney, who told the assistant district attorney that Merchant had not received notice of the sentencing judge's February 27 order.

Despite the protests of Merchant and his attorney, the officers conducted a thorough search of the residence. They found over eighty firearms. They also found chemical equipment and supplies for manufacturing phencyclidine ("PCP"). At this point, the officers halted the search and obtained a telephonic search warrant. Thereafter, the officers found other evidence of PCP manufacturing.

Based on the evidence obtained in the search, a federal grand jury indicted Merchant for manufacturing PCP, 21 U.S.C. § 841(a)(1) (1982), possessing PCC[1] with intent to manufacture PCP, 21 U.S.C. § 841(b)(1)(B)(5), and possessing piperidine with intent to manufacture PCP, 21 U.S.C. § 841(d).

Merchant moved to suppress the PCP evidence seized in the search of his house. After an evidentiary hearing, the district court denied the motion, finding that Merchant was on probation at the time of the search and had been on probation since November 14, 1980. Alternatively, the court held that even if Merchant was not on probation, the officers' reasonable good faith belief that Merchant was subject to a probation search precluded the application of the exclusionary rule.

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[1] "PCC" is an abbreviation for 1-piperidinocyclohexanecarbonitrile, a Schedule II controlled substance. *See* 21 C.F.R. § 1308.12(f)(2) (1984).

Merchant was tried on stipulated facts on the manufacturing PCP count, found guilty, and sentenced to ten years imprisonment, a special parole term of seven years, and a $25,000 fine.

II. DISCUSSION

A. Merchant's Probation

Whether Merchant was on probation when the state officers searched his house turns on whether the state court judge stayed the entire sentencing order or only that portion imposing a jail term as a condition of probation. The district court held that Merchant had been on probation since November 14, 1980, because it found that the state judge intended to stay only the jail sentence. This issue is governed by state law. *See United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983) (validity of state probation condition is governed by state law).

In its November 14 order, the state court sentenced Merchant to a three-year prison term, suspended; a three-year term of probation, effective immediately; and a six-month jail term,[2] as a condition of probation.[3] At that hearing, Merchant and his

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[2] Under California law, when jail detention is ordered as a condition of probation, the jail term is not regarded as a sentence in itself, but rather as part of the supervised effort towards rehabilitation. *Petersen v. Dunbar*, 355 F.2d 800, 802 (9th Cir. 1966); *In re Kennick*, 128 Cal. App. 2d 959, 963, 180 Cal. Rptr. 731 (1982).

[3] The sentence was as follows:

> THE COURT: Well, I am going to impose sentence at this time. I am going to place the Defendant on three years of formal probation. As a condition of probation Defendant is to—will receive a one year jail sentence for

attorney protested the probation order as unduly harsh. Merchant's attorney stated, "What I would like to do, your Honor, I do feel strongly about the second count so I would like to file a Notice of Appeal, if I could at this time." The trial judge responded, "Yes. The sentence will be stayed pending your appeal."

The government contends that when Merchant's attorney referred to the "second count," he was indicating his intention to appeal only the six-month jail confinement, and when the judge responded that the sentence would be stayed, he too was referring only to the jail term. In light of *In re Kennick*, 128 Cal. App. 3d 959, 180 Cal. Rptr. 731 (1982), we disagree.

In *Kennick*, the California Court of Appeal held that a stay of execution of a judgment stays the entire judgment, unless the trial court specifies otherwise. 128 Cal. App. 3d at 963. That case, like the one before us, involved whether a trial judge had stayed both probation and a jail term or only the latter. The court concluded that an intention to stay the jail term by itself cannot be assumed; there must be

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violation of 417(b) of the Penal Code. That sentence will be suspended. The Court will impose a jail sentence of six months on the violation of Section 417 which sentence is to be served as a condition of probation which means there will be a total of eighteen months and twelve months will be suspended. One of the conditions of probation will be that the Defendant submit his person, residence or vehicle to search and seizure at any time of the day or night by a peace officer with or without a warrant. As having in the probation report [sic] to participate in a counseling program as directed by the Probation Officer and not to possess any firearms during the period of probation.

"a specific statement of the trial court to that effect." *Id.*

We do not find any such specific statement in the record before us. The trial judge stayed "the sentence;" we cannot speculate that he meant to stay only the jail term. Moreover, at no time from the November 14 hearing to the date of the search was Merchant ever assigned a probation officer or required to report to one. And finally, when the state court granted the prosecution's motion for modification or clarification of Merchant's probation terms it stated that it was "reinstat[ing]" the probation, and not that it had been in effect all along.

These facts, viewed in light of *Kennick*, compel us to conclude that the probationary terms did not go into effect at the November 14 sentencing. The district court's conclusion to the contrary was error.

We next consider the effect of the state court's February 27 order. The court's stay of execution divested it of jurisdiction to modify the judgment during the pendency of the appeal. *Kennick*, 128 Cal. App. 3d at 692, but did not divest it of jurisdiction to revoke the stay of execution, *Stuart v. Superior Court*, 94 Cal. App. 3d 182, 184-85, 156 Cal. Rptr. 289, 291 (1979). However, the court's attempt to modify the stay was ineffective because Merchant was not given adequate notice.

When the assistant district attorney moved for a modification or clarification of the probation terms, she notified Merchant's attorney, but did not notify Merchant. At the motion hearing, Merchant's attorney was present, but Merchant was not. No waiver of his presence appears in the record. The motion argument occurred on a Friday and the search was conducted just four days later, on Tuesday. During

the interim, the assistant district attorney apparently did not make any effort to contact Merchant, and Merchant's attorney did not contact him either. Merchant had no idea that his probation had been "reinstated" or that he was subject to a warrantless search until the officers arrived at his door.

Notice is perhaps the most fundamental of due process rights. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (notice is one of the "minimum requirements of due process"); *Groppi v. Leslie*, 404 U.S. 496, 502 (1972); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *see also Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."). The principle of adequate notice is interwoven throughout our system of criminal justice. It applies at all stages of a criminal prosecution, from institution of criminal proceedings, *see, e.g., Salinas v. United States*, 277 F.2d 914, 916 (9th Cir. 1960) (due process requires that an indictment be sufficiently clear to apprise accused of the crime charged), to sentencing, *see, e.g., Gardner v. Florida*, 430 U.S. 349, 358, 362 (1977) (plurality opinion) (denial of due process to sentence defendant to death on basis of presentence report he was not allowed to see).

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Supreme Court held that the loss of liberty entailed in a probation revocation hearing is a serious deprivation requiring that the probationer be accorded due process protections. *Id.* at 781-82. Although a probationer is not entitled to the full panoply of trial-type protections, he is entitled to a preliminary probable

cause hearing and a more comprehensive final revocation hearing. *Id.* at 786. The probationer must be given notice of each hearing and an opportunity to be heard at each. *Id.*

Several other circuits have concluded, however, that *Gagnon* does not apply in the context of a proceeding to extend probation. These courts have held that the liberty interest at stake in an extension proceeding is less significant than in a revocation proceeding, and, therefore, a preextension hearing is not a constitutionally mandated right. *See, e.g., Forgues v. United States*, 636 F.2d 1125, 1127 (6th Cir. 1980) (per curiam); *United States v. Cornwell*, 625 F.2d 686, 688 (5th Cir.), *cert. denied*, 449 U.S. 1066 (1980); *United States v. Carey*, 565 F.2d 545, 547 (8th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 953 (1978); *Skipworth v. United States*, 508 F.2d 598, 601 (3d Cir. 1975).[4]

We deal here with neither a revocation nor an extension of probation, but with what amounted to an initial imposition of probation. The liberty interests at stake here are not as significant as those involved in a revocation proceeding, for the February 27 order did not make Merchant immediately subject to incarceration. But they are considerably more significant than those involved in an extension proceeding, for Merchant was not subject to *any* restrictions on his liberty prior to the court's order.

The terms of Merchant's probation imposed substantial burdens on his fourth amendment rights to be free from unreasonable searches and seizures. The

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[4] However, in three of these four cases, the courts, under their supervisory powers required notice and hearings for all future extensions of probation. *Forgues*, 636 F.2d at 1127; *Cornwell*, 625 F.2d at 689; *Skipworth*, 508 F.2d at 602-03.

terms of probation required Merchant to submit to searches at any time, by any law enforcement officer, with or without probable cause. Such terms impose a substantial burden on a fundamental right. This was a sufficient intrusion upon Merchant's liberty to require that he be given notice.

We find support for our conclusion in *Wheeler v. United States*, 640 F.2d 1116 (9th Cir. 1981). There, the trial court issued an order restricting Wheeler's correspondence privileges in prison, in order to protect several trial witnesses from harrassment. Wheeler was not notified that the order had been sought, was not present when the court issued the order, and was not formally notified of the order until four years after it was issued. *Id.* at 1118. This court concluded that the order imposed a substantial burden on Wheeler's first amendment rights, and, therefore, due process required that "[u]nless the circumstances were unusually compelling, the trial court should have held a hearing, with prior notice to Wheeler, before it issued the order." *Id.* at 1122 (footnote omitted).

The government contends that because Merchant's attorney was present at the February 27 hearing, "it was certainly reasonable . . . to infer that [Merchant] was aware" of the court's order before the search was conducted. We cannot be satisfied with inference of notice; we must have proof of it. Merchant's counsel admits that he did not notify Merchant. Nor does the government assert that state authorities made any efforts to notify Merchant directly.

The right to notice under the fifth and sixth amendments is personal to the defendant. *See Faretta v. California*, 422 U.S. 806, 819 (1975); *cf. Wheeler*, 640 F.2d at 1118 & n.3, 1122-23 (notice and hearing required before prisoner's correspondence privileges restricted even though prisoner probably was aware

of restriction shortly after it was imposed). Moreover, a defendant has a constitutional right to be present at all stages of a criminal proceeding against him. *See Bustamonte v. Eyman*, 456 F.2d 269, 272-73 (9th Cir. 1972). This right is protected by rule in federal courts, Fed. R. Crim. P. 43, and by statute in California, Cal. Penal Code § 1043 (West 1970 & 1984 Supp.). Merchant was not present at the February 27 hearing, the record does not show any waiver, and the court did not even inquire about his absence. Notice to and the presence of Merchant's attorney does not suffice.[5]

Finally, we find no reasons why Merchant could not have been notified of the motion or the February 27 hearing. Merchant had not absconded after the initial sentencing: the state authorities knew exactly where he was. The state could have contacted Merchant to tell him of the court's order, or could have postponed the search until it could be sure that Merchant had received notice from the court.

On the facts before us we conclude that Merchant was not on probation on March 3, when the state authorities arrived to search his home. The absence of notice to Merchant renders the February 27 order a nullity.

B. *Reasonableness of Officers' Conduct*

The district court alternatively held that even if Merchant was not subject to probation on March 3,

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[5] We need not decide whether Merchant's presence was required at the February 27 hearing, because we decide that the failure to give him notice of that hearing invalidated the order. We allude to the constitutional right of a defendant to be present at proceedings against him as support for our conclusion that the defendant, not merely his counsel, must be given notice.

the search conducted on that date was still valid because the state authorities relied in good faith on the state court's February 27 order. We disagree.

The Supreme Court established the so-called "good faith" exception to the exclusionary rule in *United States v. Leon*, 104 S. Ct. 3405 (1984). *Leon* held that a court should admit all evidence obtained by an officer acting in reasonable reliance on a search warrant [6] issued by a neutral and detached magistrate. The standard is *objective reasonableness*; subjective good faith is not enough. *Id.* at 3421 & n.23.[7] Applying de novo review, *United States v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1362 (1985), we conclude that the officers' conduct in the present case was not objectively reasonable.

The facts show that none of the law enforcement officers reasonably could have believed that the search

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[6] In this case, the initial entry and search were warrantless. In analyzing this case under *Leon*, we do not suggest that the "good faith" exception applies beyond the warrant context. Courts have rejected extension of the good faith rule to warrantless searches. *See, e.g., United States v. Morgan*, 743 F.2d 1158, 1165 (6th Cir. 1984); *United States v. Rule*, 594 F. Supp. 1223, 1238-39 (D. Maine 1984); *see also* Note, *Leading Cases of the 1983 Term*, 98 Harv. L. Rev. 87, 115-18 (1984). Because we decide here that the state authorities' conduct was not objectively reasonable, the evidence should be suppressed regardless of whether a *Leon* good-faith analysis is applicable.

[7] *Leon* has been applied retroactively in this circuit, albeit without discussion of the retroactivity issue. *United States v. Hendricks*, 743 F.2d at 653, 656 (9th Cir. 1984). The Eighth Circuit has considered the issue and expressly decided that *Leon* should be given retroactive effect. *United States v. Sager*, 743 F.2d 1261, 1263-65 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1196 (1985).

related to the interests of effective probation supervision. *See United States v. Johnson*, 722 F.2d 525, 528 (9th Cir. 1983). There is no showing that the state ever made any efforts toward rehabilitating Merchant. He did not receive supervision or counseling. In fact, he was never even assigned a probation officer.

The search was conducted because the assistant district attorney had received reports of gunfire on Merchant's property. After receiving the reports, she did not contact the probation department but instead filed the motion for clarification or modification of Merchant's probation. She did not inform the court of Merchant's suspected activity, nor of her earlier conversations with law enforcement officers about conducting a search of Merchant's residence if the probation search condition was in effect.[8] The search was hastily organized shortly after the order was issued.

These facts strongly suggest that the search was a subterfuge for conducting a criminal investigation. We have condemned the practice of using a search condition imposed on a probationer as a broad tool for law enforcement. *See Johnson*, 722 F.2d at 527; *Latta v. Fitzharris*, 521 F.2d 246, 251-52 (9th Cir.) (en banc), *cert. denied*, 423 U.S. 897 (1975); *cf. United States v. Jarrad*, 754 F.2d 1451, 1453-54 (9th Cir. 1985) (parole search upheld because parole officer was not acting as a "stalking horse" for police

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[8] In the absence of an assigned probation officer, it was the sentencing judge who retained the power to require supervision of the probationer, to punish violations of the conditions, and to revoke probation. *In re Osslo*, 51 Cal. 2d 371, 334 P.2d 1 (1958).

investigation). Because the search here clearly was not a genuine attempt to enforce probation but apparently had a motive of avoidance of Fourth Amendment requirements, it is the type of law enforcement conduct that ought to be deterred. Consequently, the exclusionary rule applies with full force. *See Leon*, 104 S.Ct. at 3419.[9] Therefore, the laboratory equipment and chemical supplies seized during the search must be suppressed.[10]

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[9] The government additionally argues that two California cases, *People v. Washington*, 131 Cal. App. 3d 434, 186 Cal. Rptr. 3 (1982), and *People v. Tellez*, 128 Cal. App. 3d 876, *modified on other grounds*, 129 Cal. App. 3d 722, 180 Cal. Rptr. 579 (1982), support their argument that the conduct in this case falls within the good faith exception to the exclusionary rule. We disagree.

In *Tellez* and *Washington*, officers conducted probation searches after the probations had ended, but believing that they were still in effect. The courts admitted the evidence seized on the basis that the officers reasonably had relied on representations of probation officers and of the probationers themselves that the probations were still in effect.

We have a different situation. Merchant and his attorney loudly protested that probation was not in effect. Merchant had *never* been on probation and he had no reason to believe that he was on probation on March 3. The state authorities not only took no steps to notify Merchant of the "reconsideration" of his probation or the "reinstatement" order, they engineered the "reinstatement" in order to conduct the search.

[10] The government has admitted that the search warrant, secured after the initial warrantless entry, was premised on information obtained as a result of the initial entry. Therefore, the evidence seized pursuant to the warrant was a "fruit" of the original illegality, and *all* the evidence must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

III. CONCLUSION

We conclude that Merchant was not on probation on March 3 when the state officers came to search his house because he was not given notice of the February 27 hearing at which his probation ostensibly was "reinstated." Additionally, we conclude that the officers' conduct was not objectively reasonable. Therefore, the evidence seized in the search must be suppressed.[11]

REVERSED.

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[11] We need not reach Merchant's alternative argument, that the consent to search clause of his probation violates the fourth amendment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

CR No. 81-0109 SW (SJ)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WILLIAM DAVIDSON MERCHANT
and CLEO L. MAROHN, DEFENDANTS

[Filed Oct. 28, 1981]

ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS

Defendants' motion to suppress contests the validity of a warrantless search of their residence on March 3, 1981 as well as other subsequent searches of their property and belongings. The government claims that the search was valid under the terms of probation imposed on defendant Merchant in a prior state proceeding. In addition, they claim they had authority to enter the residence to execute a civil levy in connection with prior judgment held against defendant Merchant. An evidentiary hearing on this matter was held on October 20, 1981. For the reasons outlined below, the court hereby denies defendants' motion.

I

In 1980, defendant Merchant was convicted on two counts of brandishing firearms. As to count one, the court imposed a one year suspended sentence. As to count two, the court imposed a six month jail term. In addition, defendant Merchant was placed on three years probation on the condition that he "submit his person, residence or vehicle to search and seizure at any time of the day or night by a peace officer with or without a warrant."

At the sentencing hearing held on November 14, 1980 defendant claimed that a jail sentence would cause him severe financial hardship. While fearful of the potential danger defendant posed to the public, it appears the court was willing to stay imposition of the jail term to give defendant a chance to enter a work furlough program. In addition, it appears that the court stayed the sentence pending defendant's appeal of the conviction on the second count. The main dispute between the parties is whether the stay applied to the jail sentence alone or to both the jail sentence and the probation.

Between the date of the sentencing hearing and February 1981, the authorities received a number of reports concerning possible probation violations at defendant Merchant's residence. In February, the District Attorney filed a Motion for Clarification/Modification of the sentencing to prevent any disagreement over whether defendant Merchant was under probation. At the hearing held on the motion, defendant Merchant did not appear, but his attorney, Mr. Foster did. Mr. Foster did not object to the motion and the court therefore granted it.

Five days later, the authorities conducted the search of defendants' residence. A number of guns

were found at the residence, in violation of the terms of the probation. In addition, during this and subsequent searches, the police seized a number of illicit drugs and drug manufacturing supplies and equipment.

II

The court disagrees with the arguments of defendants and finds that the stay originally granted applied only to the count carrying the jail sentence. A reading of the entire transcript from the sentencing hearing makes this abundantly clear. The trial court judge was obviously deeply concerned about the potential danger defendant Merchant posed. He wanted to ensure that Merchant would not have access to guns in the near future. The stay of the jail term was granted only because of the immediate economic hardship it might pose to the defendant and so the second count of the conviction could be appealed. In addition, the record clearly indicates that the defendant and his lawyer, Mr. Foster were concerned only with an immediate stay of the jail sentence. There was no objection to the term or conditions of the probation.

The fact that the District Attorney sought a clarification or modification of the sentence does not change what happened at the hearing. Whether the judge felt he was clarifying or modifying the sentence imposed is admittedly not entirely clear from the brief transcript of the hearing. This lack of clarity is simply not enough, however, to challenge the conclusion that defendant Merchant was under probation from November 14th on. Since the court finds that probation for defendant Merchant began in November, it need not address the question of whether his absence from the February 27th hearing nullifies that proceeding.

Assuming *arguendo* that defendant was not under the terms of the probation at the time of the search, it is clear that at least from February 27th on, the law enforcement personnel involved and, for that matter, defendant's attorney Mr. Foster, all held a good faith belief that they had the authority to make a warrantless search of defendant's residence based on the trial court's ruling on the motion for clarification or modification. A number of recent cases hold that the exclusionary rule does not apply where evidence "is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken belief that they are authorized." *United States v. Williams*, 622 F.2d 830, 840 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 946 (1981). Under this standard then, defendants' motion to suppress would be defeated.

III

The court therefore denies defendants' motion in so far as it applies to the initial search of defendants' residence. The court also finds that the subsequent searches of defendants' residence and other property conformed to the requirements of the Fourth Amendment and are therefore not subject to the Exclusionary Rule.

For the reasons given, and for the good cause appearing, IT IS HEREBY ORDERED that defendants' motion to suppress be DENIED.

DATED: 10-28-81

/s/ Spencer Williams
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1135

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

DAVID WILLIAM MERCHANT, DEFENDANT-APPELLANT

[Filed Jan. 13, 1986]

ORDER

Before: MERRILL, FLETCHER and CANBY, Circuit Judges

The panel in this case voted to deny the petition for rehearing, and to deny the petition for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1135

DC No. Cr 81-109-1 SW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WILLIAM DAVIDSON MERCHANT,
DEFENDANT-APPELLANT

[Filed May 14, 1985]

JUDGMENT

Appeal from the United States District Court
for the Northern District of California (San Jose)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Jose) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Reversed.

Filed and entered May 14, 1985.

APPENDIX E

MUNICIPAL COURT OF THE
SANTA CRUZ COUNTY
JUDICIAL DISTRICT
COUNTY OF SANTA CRUZ,
STATE OF CALIFORNIA

No. ———

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

DAVID WILLIAM MERCHANT, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS
COURTHOUSE ANNEX,
WATSONVILLE, CALIFORNIA
FEBRUARY 27, 1981
BEFORE THE
HONORABLE JOHN A. MARLO, JUDGE

APPEARANCES

For the People:

PATRICIA BAZAR, ESQ.,
Deputy District Attorney

For the Defendant:

SAMUEL FOSTER, ESQ.,
Attorney at Law

Reported by:

CORINNE M. KAITZ
Shorthand Reporter

Case No. CR 15714

Watsonville, California February 27, 1981

PROCEEDINGS

THE COURT: David Merchant, CR 15714. Mr. Foster is present. The Defendant is not present.

MR. FOSTER: I would state that I do agree on the first count. My appeal is very weak and I would agree that the motion is well taken as far as probation is concerned.

THE COURT: Court will grant the motion for clarification. Defendant will be reinstated on the terms of probation.

MS. BAZAR: Including no guns?

THE COURT: The entire probation order that he signed.

MS. BAZAR: Fine, Your Honor.

THE COURT: He doesn't have to report for confinement yet.

COUNTY OF SANTA CRUZ)
) ss.
STATE OF CALIFORNIA)

I, CORINNE M. KAITZ, a Shorthand Reporter in and for the State of California, do hereby certify:

That I am the Reporter, duly appointed and sworn who reported the above and foregoing proceedings in the matter entitled PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. DAVID WILLIAM MERCHANT, Defendant, at the time and place first therein mentioned:

That I reported said proceedings fully and correctly, to the best of my ability, and the foregoing pages numbered 1 to 2, inclusive, are a full, true, complete and correct transcription of my shorthand notes taken at said time and place, prepared under my direction and supervision; and that the said pages constitute a full, true, complete and correct statement of said proceedings then and there had.

Dated this —— day of March, 1981.

CORINNE M. KAITZ
Shorthand Reporter

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